Supreme Court, U.S.
FILED

09-406 SEP 14 2009

OFFICE OF THE CLERK

Docket No

In The

Supreme Court of the United States

UNITED STATES ex rel. DARIAN

Plaintiff-Petitioner,

vs.

ACCENT BUILDERS, INC., et al.

Defendant

DAVID J. PASTERNAK et. al.

Defendant-Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

APPENDIX

Bruce H. Darian
P.O. Box 42
Hollywood, CA 90028
Tel. 310-428-8131
Fax 310-374-0134

APPENDIX

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JOHN S. GORDON
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief. Civil Division
GARY PLESSMAN
Assistant United States Attorney
Chief, Civil Fraud Section
LISA A.PALOMBO
Assistant United States Attorney
Civil Fraud Section
California Bar No. 169119
Room 7516, Federal Building
300 North Los Angeles Street
Los Angeles, California 90012
Telephone: (213)894-4042
Fax: (213)894-2380
Attorneys for the United States of America

FILED
CLERK, U.S. DISTRICT COURT
MAY 18 2001
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, ex rel. BRUCE DARIAN, individually and doing business as DARIAN CONSTRUCTION CO., on his own behalf,	) NO. CV-00-10255-FMC (JWJx)) ORDER RE UNITED STATES' ELECTION TO DECLINE INTERVENTION AND UNSEALING OF COMPLAINT
Plaintiffs,	)
v.	) [LODGED UNDER SEAL]
ACCENT BUILDERS, INC., a California Corporation; et al.,	) [Filed concurrently under Seal: Notice of Election by the
Defendants.	)

ENTERED ON ICMS
MAY 20 2001

) United States of
) America to Decline
) Intervention]

Whereas the United States of America ("the Government") has declined to intervene in this action at this time pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(2) and (4), the Court hereby rules as follows:

1. The seal is lifted from the Complaint, the Notice of Election by the United States of America to Decline Intervention ("the Notice of Election"), and this Order. The relator shall serve the Complaint, the Notice of Election and this Order upon each of the defendants.

2. All pleadings and papers filed or lodged with the Court in this action as of the date of this Order, other than those identified in Paragraph 1 above, shall remain under seal and shall not be served on the defendants or otherwise made public.

3. All pleadings and papers filed or lodged with the Court in this action after the date

of this Order shall not be sealed unless otherwise ordered by the Court.

4. The parties shall serve all pleadings, motions, orders, and other papers hereafter filed or lodged in this action on the Government.

5. Pursuant to 31 U.S.C. § 3730 (c) (3), the Government may intervene in this action at a later time upon a showing of good cause. Should any of the parties propose that this action be dismissed, settled, or otherwise discontinued, the Court will provide the United States with notice and an opportunity to be heard before the Court rules or grants its approval.

DATED: _____ /S/
UNITED STATES
DISTRICT JUDGE

Respectfully presented by:

JOHN S. GORDON
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

GARY PLESSMAN
Assistant United States Attorney
Chief, Civil Fraud Section

/S/
LISA A. PALOMBO
Assistant United States Attorney

Attorneys for the
United States of America

PROOF OF SERVICE BY MAILING

I am over the age of 18 and not a party to the within action. I am employed by the Office of United States Attorney, Central District of California. My business address is 300 North Los Angeles Street, Suite 7516, Los Angeles, California 90012.

On May 16, 2001 I served

(PROPOSED] ORDER RE UNITED STATES' ELECTION TO DECLINE INTERVENTION AND UNSEALING OF COMPLAINT

on each person or entity named below by enclosing a copy in an envelope addressed as shown below and placing the envelope for collection and mailing on the date and at the place shown below following our ordinary office practices. I am readily familiar with the practice of this office for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid. Date of mailing: May 16, 2001. Place of mailing: Los Angeles, California.

Person(s) and/or Entity(ies) to Whom mailed:

Bruce Darian
23852 Pacific Coast Highway
Suite 277
Malibu, CA 90265

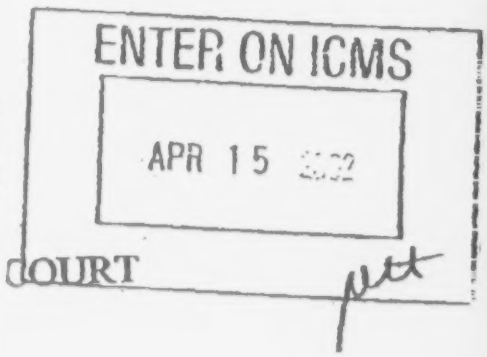
I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on: May 16, 2001 at Los Angeles, California.

/S/
CAROL M. YBARRA

JOHN S. GORDON
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief. Civil Division
GARY PLESSMAN
Assistant United States Attorney
Chief, Civil Fraud Section
LISA A.PALOMBO
Assistant United States Attorney
Civil Fraud Section
California Bar No. 169119
Room 7516, Federal Building
300 North Los Angeles Street
Los Angeles, California 90012
Telephone: (213)894-4042
Fax: (213)894-2380
Attorneys for Plaintiff
United States of America



UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

BRUCE DARIAN, individually and doing business as DARIAN CONSTRUCTION CO.,	) NO. CV-00-10255-FMC) (JWJx)) UNITED STATES') AMICUS CURIAE
Plaintiffs,	) BRIEF IN OPPOSITION) TO MOTION TO DISMISS) FILED BY DEFENDANTS
v.	) DAVID J. PASTERNAK) AND PASTERNAK,
ACCENT BUILDERS, INC., et al.,	) PASTERNAK & PATTON)

(306)

Defendants.) Date: April 29, 2002
) Time: 10:00 a.m.
) Place: Roybal Bldg, Rm 750
) Honorable Florence Marie
) Cooper

The United States respectfully submits this *amicus curiae* brief in opposition to defendants David J. Pasternak and Pasternak, Pasternak & Patton's ("Pasternak's") Motion to Dismiss the Second Amended Complaint. The United States opposes the motion insofar as it seeks dismissal of the first and second causes of action on the ground that the relator does not have standing to sue or collect on behalf of the United States under the False Claims Act ("the FCA"), 31 U.S.C. § 3729 *et seq.*

I. *QUITAM* ACTIONS UNDER THE FALSE CLAIMS ACT

The FCA prohibits any person from "knowingly" presenting "a false or fraudulent claim for payment or approval" to the federal government. 31 U.S.C. § 3729(a)(l). It provides that the Attorney General of the United States "diligently shall investigate a violation," and may bring a civil action if he finds that a person

has committed a violation. *Id.* at § 3730(a).

The FCA also authorizes individual citizens ("relators") to bring private suits, referred to as *qui tarn* actions, to enforce the FCA for the United States. *Id.* at § 3730(b)(l). After a *qui tarn* action is filed, the United States must decide to intervene and take over the action or to notify the court that it is declining to take over the action. *Id.* at § 3730(b)(4). If the United States intervenes, "it shall have primary responsibility for prosecuting the action." *Id.* at § 3730(c)(l). If the United States declines to intervene, the relator has "the right to conduct the action." *Id.* at § 3730(b)(4). The United States, however, remains the real party in interest, having a statutory entitlement to between 70 and 75 percent of any funds recovered by the relator, notwithstanding its election to decline to intervene. *See U.S. ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994).

Here, the United States did not intervene. Relator Bruce Darian, however, has exercised his right to conduct the action.

II. ARGUMENT

Among the many arguments raised by defendants, the Pasternak defendants argue that relator does not have standing to sue or collect monies on behalf of the United States, apparently based on the fact that the United States declined to intervene.[1] *See* Pasternak Reply at p. 1, fn. 1. This interpretation of the FCA, however, is incorrect.[2] It is contrary to the express language of the FCA and established Supreme Court authority. Moreover, the United States' intervention decision should not be

---

[1] After the United States declined to intervene, the Court issued an order amending the case caption to delete reference to the United States. This change in the caption, however, does not alter the relator's statutory right to conduct the action on behalf of the United States. *See* 31 U.S.C. §3730(b)(4)(B); *McKnight v. Blanchard*, 667 F.2d 477,482 (5* Cir. 1982) ("The administrative captioning of the suit obviously has no effect on what cause of action and what parties are (or are not) joined in the substantive allegations of the pleadings"); *In re Warren et al, v. Warren*,20 BR 900 (1982), citing *Lund ex rel Wilbur v. Pratt*. 308 A.2d 554, 557 (Me 1973) ("The caption of a complaint constitutes no part of the statement of the cause of action, and the rights of the parties to relief cannot be made to depend upon what may appear in the caption of the case").

[2] The United States has a significant interest in the proper construction of the FCA as it is "the government's primary litigative tool for combatting fraud against the federal government." *See United States ex, rel Kelly v. The Boeing Co.*, 9 F.3d 743,745 (9A Cir. 1993).

considered when evaluating the merits of the relator's case.

A. The Relator Has Standing To Bring FCA Claims

The express language of the FCA authorizes relators to bring *qui tarn* actions to enforce the FCA for the United States. "A person may bring a civil action for a violation of section 3729 for the person and for the United States government." 31 U.S.C. § 3730(b). Congress also made clear that a relator is free to pursue an FCA case even when the United States declines to do so. 31 U.S.C. § 3730(b)(4)(B) (after the government notifies the Court that it has declined to take over the action, "the person bringing the action shall have the right to conduct the action").

Moreover, the Supreme Court has rejected the very standing argument raised by defendants here. *See Vermont Agency of Nat. Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 120 S.Ct. 1858,146 L.Ed.2d 836 (2000). The Court found that relators have standing because the

United States has made a partial assignment to them of its damage claims. The Court explained that relators assert claims in a dual capacity: both for themselves and for the United States. 529 U.S. at 772-73, 120 S. Ct. at 1862-63. Thus, notwithstanding the government's decision not to intervene, the relator has standing to assert FCA causes of action on behalf of the United States.

B. No Significance Should Be Accorded the Government's Decision Not to Take Over A *Qui Tarn* Action

Precisely because Congress intended relators to be free to pursue FCA cases even when the United States declines to intervene, a relator's suit should be considered on its own merits. There are various reasons why the United States might elect to take over a *qui tarn* case, and the courts and litigants should draw no conclusions about the merits of an action based on the government's intervention decision.[3]

---

[3] See *United States ex rel. Berge v. Board of Trustees of the University of Alabama*, 104 F.3d 1453,1458 (4th Cir. 1997)

III. CONCLUSION

For the foregoing reasons, defendants' argument that the relator lacks standing to bring causes of action under the False Claims Act should be rejected.

DATED: April 8, 2002

JOHN S. GORDON
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
GARY PLESSMAN
Assistant United States Attorney
Chief, Civil Fraud Section

By: /s/
LISA A. PALUOMBO

Assistant United States Attorney
Civil Fraud Section

Attorneys for Plaintiff
United States of America

(" decimation does not mean action lacks merit)' *United States ex rel. Newsham v. Lockheed Missiles and Space Co.*, 171 F.3d 1208 (9th Cir. 1999) government need not intervene in meritorious cases).

PROOF OF SERVICE BY MAIL

I am over the age of 18 and not a party to the within action. I am employed by the Office of the United States Attorney, Central District of California. My business address is 300 North Los Angeles Street, Suite 7516, Los Angeles, California 90012.

On April 8, 2002, I served **UNITED STATES' AMICUS CURIAE BRIEF IN OPPOSITION TO MOTION TO DISMISS FILED BY DEFENDANTS DAVID J. PASTERNAK AND PASTERNAK, PASTERNAK & PATTON** on each person or entity named below by enclosing a copy in an envelope addressed as shown below and placing the envelope for collection and mailing on the date and at the place shown below following our ordinary office practices. I am readily familiar with the practice of this office for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

Date of mailing: April 8, 2002. Place of mailing: 300 N. Los Angeles Street, Los Angeles, California 90012.

TO: **SEE ATTACHED SERVICE LIST**

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on: April 8, 2002 at Los Angeles, California.

/S/
ADELE DAVIS

Service List

Bruce Darian, Pro Per
Darian Construction Co.
730 Pier Avenue, Suite B345
Hermosa Beach, CA 90254

Henry N. Jannol, Esq.
Paul H. Levine, Esq.
Law Offices of Henry N. Jannol
1875 Century Park East, Suite 1400
Los Angeles, CA 90067

Frank W. Molloy, Esq.
Hunter, Molloy & Salcido, LLP
251 South Lake Avenue, Suite 330
Pasadena, CA 91101

David J. Pasternak, Esq.
Pasternak, Pasternak & Patton
1875 Century Park East, Suite 2200
Los Angeles, CA 90067-2523

Theodore B. Zinger, Esq.
Deputy Attorney
General Office of the Attorney General
300 S. Spring Street, Fifth Floor
Los Angeles, CA 90013

Scott C. Nave, Esq.
Lemieux and O'Neill
2393 Townsgate Road, Suite 201
Westlake Village, CA 91361

Christi Hogin, Esq.
Jenkins & Hogin, LLP
1325 Nineteenth Street
Manhattan Beach, CA 90266

H. Scott Sirlin
Jeffrey A. Evans, Esq.
Gordon &Rees LLP
300 S. Grand Avenue, Suite 2075
Los Angeles, CA 90071

Peter M. Glick, Principal Deputy County Counsel
Los Angeles Office of County Counsel
Room 648
Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, CA 90012

Irum M. Rana, Esq.
Lewis, D'Amato, Brisbois & Bisgaard LLP
221 N. Figueroa Street, Suite 1200
Los Angeles, CA 90012

Wayne W. Call, Esq.
Mark L. Eisenhut, Esq.
Call & Jensen
610 Newport Center Drive, Suite 700
Newport Beach, CA 92660

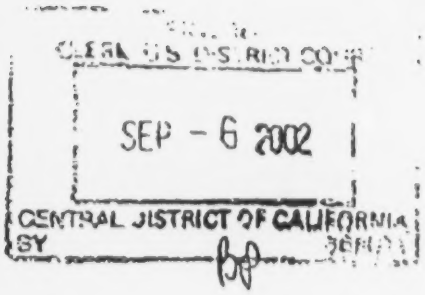
Todd E. Croutch, Esq.
Daniel K. Dik, Esq.
Fonda & Fraser, LLP
1888 Century Park East, Suite 1777
Los Angeles, CA 90067-1721

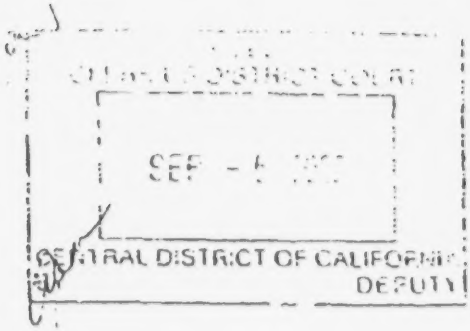
Timothy Lee, Esq.
Law Offices of Timothy Lee
11900 West Olympic Blvd., Suite 680
Los Angeles, CA 90064

Samuel J. Arsht, Esq.
Jeffrey S. Frasier, Esq.
Silver & Arshf
1860 Bridgegate Street
Westlake Village, CA 91361-1614

Mr. Don C. Robinson
Arrow Security Services
17252 Hawthorne Blvd. Suite 268
Torrance, CA 90504

Michael K. Walton, Esq.
Cosgrove, Vergeer & Kester, LLP
Bank of America Financial Center
121 SW Morrison, Suite 1300
Portland, OR 97204-3193





UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRUCE DARIAN, individually and doing business as DARIAN CONSTRUCTION CO.,	] CV-00-10255-FMC (JWJx)]
Plaintiff(s),	] ORDER GRANTING THE] MOTION TO DISMISS OF] DEFENDANTS DAVID] PASTERNAK AND] PASTERNAK,] PASTERNAK & PATTON
v.	]
ACCENT BUILDERS, INC., etc.	]
Defendants,	]

This matter is before the Court on the Motion to dismiss (Docket #220) of Defendants David Pasternak, State Court Receiver, and Pasternak, Pasternak & Patton, a law corporation (collectively, "Moving Defendants"). For the reasons

set forth below, the Court hereby GRANTS the Motion.

I. Background

On December 12, 2001, this Court dismissed without prejudice Plaintiff's First Amended Complaint ("FAC") for its failure to comply with Rule 8(e)(l)'s requirement that "each averment of a pleading shall be simple, concise, and direct." In particular, the Court found that the FAG, which named more than 50 defendants and asserted each of its 54 causes of action against all 50 defendants, was rambling and made it impossible to determine which causes of action were asserted against which defendants. As a result, it was impossible for defendants to framc reasonable responses and mount effective defenses. *See McHenry v. Renne*, 84 F3d 1172,1179-80 (9th Cir. 1996) ("Something labeled a complaint but written more as a press

release, prolix in evidentiary detail, yet without simplicity, conciseness, and clarity as to whom Plaintiff's are suing for what wrongs, fails to perform the essential functions of a complaint.").

On January 10, 2002, Plaintiff filed his Second Amended Complaint ("SAC"), which names more than 80 individual and corporate defendants and alleges 41 causes of action. Defendants David J. Pasternak and Pasternak, Pasternak & Patton are named as Defendants to many of those causes of action.

On January 18, 2002, the instant Motion to dismiss was filed by Moving Defendant.

II. Legal Standard

Moving Defendants' Motion requires the Court to determine whether the Complaint states any claim upon which relief may be granted. See Fed R. Civ. P. 12(b)(6). The Court will not dismiss

Plaintiff's claims for relief unless he cannot prove any set of facts in support of his claims that would entitle him to relief. *See Steckman v. Han Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998). In limiting its inquiry to the content of the Complaint, the Court must take the allegations of material fact as true and construe them in the light most favorable to the plaintiff. *See Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428,1430 (9th Cir. 1985). Additionally, the Court "is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F3d 752,755 (9th Cir. 1994).

III. Discussion

A. Plaintiff's Claims that have previously been dismissed with prejudice as to all Defendants

As discussed previously in various Court Orders regarding other Defendants' Motions to dismiss, the 2nd, 5th, 6th, 7th, 9th, 12th through 28th and 30th through 40th causes of action are dismissed with prejudice as against all Defendants, including Moving Defendants. See Halco Electric Order; Malibu Defendants' Order; Lambertson Order.

B. Remaining Causes of Action

As against both David Pasternak and Pasternak, Pasternak & Patton, only Plaintiff's 1st, 4th, 8th, 29h, and 41st claims remain.

1. Claims against David Pasternak

Plaintiff's Complaint, at ¶¶425 through 437, makes clear that Plaintiff has sued David

Pasternak and his law firm on the basis of his actions as State Court Receiver of the joint venture business known as Darian Construction Co./Accent Builders, Inc. On or about June 5, 2000, Los Angeles Superior Court Judge Patricia Collins appointed David Pasternak as receiver in the matter of *Accent Builders, Inc. v. Darian Construction Co.*, Los Angeles Superior Court No. SC 061016 (the "State Court Action").

Plaintiff claims against David Pasternak are barred for a number of reasons. First, on October 31, 2001, Judge Collins issued an Order that, among other things, explicitly enjoined Plaintiff Darian from suing Pasternak based on his actions as a Receiver:

> Plaintiff Accent Builders, Inc. and Defendant Darian Construction Co. and their principals, officers, directors, agents and employees are

> enjoined and restrained from initiating or pursuing any claims or actions against the Receiver, his law firm or his bond (including any previously initiated claims and actions) unless they first obtain an order from this Court specifically authorizing them to initiate any such claim or action, except to the extent that this injunction is inconsistent with any federal court order.

October 3, 2001, Order (see Exhibit C to Pasternak Declaration).

In enjoining Plaintiff from suing Pasternak without first getting her permission, Judge Collins was plainly following California law, which prohibits law suits against a receiver unless prior authorization is obtained from the state court

supervising the receiver. *See e.g. McCarthy v. Pouken*, 173 Cal.App.3d 1212,1219 (1985) ("a receiver may not be sued without leave of court"); *Ostrmvski v. Miller*, 226 Cal.App.2d 79,84 (1964) ("A receiver is a court-appointed official who can be sued only by permission of the court appointing him."). Darian's claim against David Pasternak must be dismissed because he has not obtained prior authorization from Judge Collins to bring this suit against Pasternak. This dismissal is without prejudice, because although Judge Collins has not yet authorized suit against Pasiernak, "[i]t is possible that [she] might on a later determination consent to such a suit." *Ostrowski,* 226 Cal.App.2d at 87. Thus, Plaintiff could sue David Pasternak if he first obtained authorization from Judge Collins.

However, Plaintiff would still face an additional hurdle in his attempt to sue Pasternak. As Receiver in the state court action, Pasternak enjoys absolute derivative judicial immunity from

suit in federal court for his performance of his duties as receiver. *See New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298,1302-03 (9th Cir. 1989) In *New Alaska*, the Ninth Circuit held that "absolute derivative judicial immunity is appropriate" for "a receiver appointed by a state court to manage the business assets" of the parties during litigation. *Id.* at 1303. Absolute immunity is justified because "[a]bsent broad immunity, receivers would be 'a lightning rod for harassing litigation aimed at judicial orders.'" *Id.* (quoting *Kermit Const v. Banco Credito YAhorra Ponceno*, 547 F.2d 1,3 (1st Cir. 1976). This rationale seems particularly applicable in the instant action.

In New Alaska, the Court of Appeals recognized that there are exceptions to absolute judicial immunity. However, in his Second Amended Complaint Plaintiff has not pleaded facts supporting the existence of any of those exceptions, nor does it appear that he could. Plaintiff's

Complaint demonstrates that Pasternak functioned pursuant to the Court's subject matter jurisdiction and that Plaintiff's allegations against Pasternak concern his actions as receiver in the state court action. As discussed explicitly in New Alaska, allegations concerning a receiver's negligence in carrying out his job should be pursued before the state court judge who appointed the receiver, not as part of a collateral proceeding in federal court. See *id.* at 1304. And even Plaintiff's allegations that Pasternak's "discombobulation of the receivership was well planned and not a product of unintentional error" (Complaint at ¶1435) cannot overcome Pasternak's absolute derivative judicial immunity, because "malice and corrupt motive in the performance of judicial tasks is insufficient to deprive a judge of absolute immunity." *Id.*

2. Claims against Pasternak, Pasternak & Patton

Although Pasternak, Pasternak & Patton are

named as Defendants in many causes of action, there are no substantive allegations against them anywhere in the Complaint. For that reason alone, dismissal is proper. The law firm was only dragged into this lawsuit because David Pasternak is a partner in the firm, and there are no accusations against the law firm beyond the allegations against David Pasternak. Accordingly, the law firm is entitled to the same immunity from suit as David Pasternak, and dismissal of Plaintiff's claims without prejudice is appropriate.

3. Plaintiff's violation of Judge Collins' Injunction

The Court is seriously concerned about Plaintiff's conduct in refusing to dismiss his claims against David Pasternak and his law firm. Plaintiff refused to dismiss even after Pasternak had informed Plaintiff that well settled principles of California law clearly barred Plaintiff's claims. More troubling is Plaintiff's decision to bring this suit against

Pasternak in the first place after Judge Collins had issued an Order explicitly enjoining Plaintiff, among others, from suing David Pasternak without first obtaining her consent. Plaintiff has directly violated Judge Collins' Order by including David Pasternak as a Defendant in this federal action. Should Plaintiff seek authorization to sue Pasternak from Judge Collins, he may find that she is more likely to impose sanctions on him for his violation of her Order than to give him the authorization he desires.

This Court will not tolerate the filing of frivolous papers or the maintenance of frivolous claims, and reminds Plaintiff that he is not exempt from either the Local Rules or the Federal Rules of Civil Procedure merely because he is appearing *pro se*. See Local Rule 83-2,10.3 ("Any person appearing pro se will be required to comply with these Local Rules, and with the F.R.Civ.P., F.R.Crim.P.,

F.R.Evid. and F.R.App.P.")- Although the Court does not raise the issue of sanctions against Plaintiff at this time, it will not hesitate to do so in the future should such action prove necessary.

IV. Conclusion

The Court hereby GRANTS Defendants' Motion to dismiss without prejudice. (Docket #220). Plaintiff may not replead any of his causes of action against David Pasternak or his law firm without first obtaining Judge Collins' authorization to do so.

September 4, 2002 /S/
FLORENCE-MARIE COOPER,
JUDGE
UNITED STATES DISTRICT
COURT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 00-10255 FMC(JWJx)

Date: January 30, 2006

Title BRUCE DARIAN, et al. v. ACCENT BUILDERS, et l.

Present: The
Honorable FLORENCE-MARIE COOPER

Alicia Mamer	Not present	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiff's: Not present
Attorneys Present for Defendants: Not present

Proceedings: ORDER ON DEFENDANTS' MOTION FOR CERTIFICATION OF PARTIAL FINAL JUDGMENT (In Chambers)

This matter is before the Court on the Motion for Certification of Partial Final Judgment (docket no. 636) pursuant to Fed. R. Civ. P. 54(b) filed on December 16, 2005, by Defendants David J. Pasternak, State Court Receiver, and Pasternak, Pasternak & Patton, a law corporation ("Moving Defendants"). The Court has read and considered the moving, opposition, and reply documents submitted in connection with this motion, and the Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15.

Moving Defendants ask the Court to exercise its discretion to enter partial final judgment on the ground that there is no just reason for delay in doing so because all claims against Moving Defendants were adjudicated in their favor in September 2002 and the certification of partial final judgment in their favor will allow the state court to finally close this receivership and distribute the remaining assets of the receivership estate. Fed. R. Civ. P. 54(b) ("... the court may direct the entry of a final judgment...only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."). As the Court's November 21, 2005 Order, policy considerations generally mitigate against entry of partial final judgment. Cf. American States Ins. Co. v. Dastar Corp., 318 F.3d 881, 884 (9th 2003) ("The final judgment rule promotes judicial efficiency, avoids multiplicity of litigation and minimizes delay by " 'forbid[ding] piecemeal disposition on appeal of what for practical purposes is a single controversy.]' " (internal quotations and citations omitted)).

In this instance, Moving Defendants have demonstrated that the assets of the receivership estate should not be expended while this litigation nominally continues against them. Accordingly, good cause having been shown, moving Defendants' Motion for Partial Final Judgment is GRANTED The hearing set for January 6, 2006, is removed from the Court's calendar.

_____: N/A

Initials of Preparer AM

DOCKETED ON CM
FEB - 1 2006
BY _____ 001

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Page 1 of 1

FILED

JUN 16 2009

MOLLY C. DWYER, C
U.S. COURT OF APPE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRUCE DARIAN, Individually, on his own behalf, aka SEAL 1 dba Darian Construction, Co.,

Plaintiff - Appellant,

and

USA, EX REL. DARIAN, as a Relator on behalf of the United States Government,

Plaintiff,

v.

ACCENT BUILDERS, INC., a California corporation, aka SEAL A; ANTHONY LAWRENCE FEDERICO, aka SEAL B; RONALD RAY FEDERICO aka SEAL C; SUPERIOR GUNITE, a California corporation, aka SEAL D,

Defendants,

AMERICAN INTERNATIONAL COMPANIES; ROBERT G. KELLY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH,

Defendants,

and

No. 06-55692

D.C. No. CV-00-10255-FMC
Central District of Californi
Los Angeles

ORDER

DAVID PASTERNAK;
PASTERNAK, PASTERNAK
& PATTON,

Defendants – Appellees.

Before: RYMER and GRABER, Circuit Judges, and ALDRICH*, District Judge.

The memorandum disposition filed on June 5, 2009, is withdrawn in light of *United States ex rel. Eisenstein v. City of New York*, No. 08-660, ___ S. Ct., ___ 2009 WL 1576.570 (June 8, 2009). The attached memorandum disposition is filed in its stead.

* The Honorable Ann Aldrich, Senior United States District Judge for the Northern District of Ohio, sitting by designation.

FILED

JUN 16 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRUCE DARIAN, Individually, on his own behalf, aka SEAL 1 dba Darian Construction, Co.,

Plaintiff - Appellant,

and

USA, EX REL. DARIAN, as a Relator on behalf of the United States Government,

Plaintiff,

v.

ACCENT BUILDERS, INC., a California corporation, aka SEAL A; et al.,

Defendants,

AMERICAN INTERNATIONAL COMPANIES; et al.,

Defendants,

and

DAVID PASTERNAK; et al.,

No. 06-55692

D.C. No. CV-00-10255-FMC

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3

Defendants – Appellees.

Appeal from the United States District Court
for the Central District of California
Florence-Marie Cooper, District Judge, Presiding

Submitted June 3, 2009**
Pasadena, California

Before: RYMER and GRADER, Circuit Judges, and ALDRICH,*** District Judge.

Bruce Darian appeals pro se from the district court's judgment under Federal Rule of Civil Procedure 54(b) in favor of state court-appointed receiver David Pasternak and his law firm. We lack jurisdiction and therefore must dismiss the appeal.

For purposes of determining the timeliness of a Notice of Appeal, the United States is

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Ann Aldrich, Senior United States District Judge for the Northern District of Ohio, sitting by designation.

only considered a party in a qui tarn action under the False Claims Act if it formally intervenes. See *United States ex rel. Eisenstein v. City of New York,* No. 08-660, ___ S. Ct. ___, 2009 WL 1576570, at *3 (U.S. June 8, 2009). Because the United States never intervened, Darian had only thirty days, not sixty, to file his Notice of Appeal. See Fed. R. App. P. 4(a)(l)(A). He failed to do so and therefore we lack jurisdiction.

DISMISSED.